91-1420 (1)

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1991

Joan Growe, Secretary of the
State of Minnesota, et al.,
Appellants,

v.

James Emison, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Was the federal court required by principles articulated in Scott v. Germano to defer to the state court where parallel actions challenging the state's legislative and congressional districts were filed in each court?

Does the federal court's order violate principles of Full Faith and Credit and collateral estoppel which extend to state court judgments?

Did the federal court err in not dismissing as moot the claims asserted by the federal plaintiffs?

Is the federal court's finding of a Voting Rights Act violation, made in the context of a wholly undeveloped factual record, clearly erroneous?

Assuming, arguendo, that the federal court correctly determined that the state redistricting plan as applied to the City of Minneapolis violates the Voting Rights Act, did the federal court nonetheless err in redistricting the entire state in a manner inconsistent with state policy?

LISTING OF ADDITIONAL PARTIES

Appellants

Patricia Cotlow, Philip Krass, Sharon LaComb, James Stein, and Theodore Suss, individually and on behalf of all citizens of Minnesota similarly situated; Patrick O'Connor, Hennepin County Auditor, individually and on behalf of all County Auditors of the State of Minnesota; the Seventy-seventh Minnesota State House of Representatives; and the Seventy-seventh Minnesota State Senate.

Appellees

Judy Fairbanks, Marie Iverson, Ken Dean, Steve Castillo, Lew Freeman, and Yao Lo, individually and on behalf of all Citizens and Voters of the State of Minnesota similarly situated; Duane Benson, Terry Dempsey, Delores Hettig, Richard Harmon, David E. Peterson, E.M. Patricia Pidcock, and Frank Ringsmuth; and Mark Lundgren, Carver County Auditor, individually and on behalf of all County Auditors of the State of Minnesota.

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Appellants,

vs.

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Appellees.

**Appeal from the United States District Court
for the District of Minnesota**

CITATION TO OPINION BELOW

The February 19, 1992, Memorandum Opinion and Order issued by the three-judge federal court is not officially reported. It was filed in the United States District Court for the District of Minnesota, Fourth Division, as Civil File Number 4-91-202, and is set forth in the accompanying Appendix at App. A-11.

JURISDICTION

The Order and Judgment appealed from were filed on February 19, 1992. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1, the constitutional, statutory and other provisions involved in this case are set out in the Appendix at App. A-373.

STATEMENT OF THE CASE

Since early 1991, actions have been pending in Minnesota state court and in Minnesota federal district court challenging the constitutionality of Minnesota's legislative and congressional districts after the 1990 Census.

The first action was commenced in state court on January 24, 1991, while the Minnesota Legislature was in session but before it had adopted any redistricting plans. Complaint in Cotlow, et al. v. Growe, App. A-174. The plaintiffs sought a declaratory judgment that the 1982 federal court-mandated legislative and congressional redistricting plans violate the state and federal constitutions.

On March 18, 1991, the appellees James Emison, et al., commenced this action. Their complaint asked the federal court to declare that the 1982 legislative plan violated the Minnesota Constitution, the United States Constitution, and the Voting Rights Act.

During February and March of 1991, redistricting committees

of the Legislature held public hearings around the State, including one in the Black neighborhood of north Minneapolis, soliciting public comment on standards for and content of plans for legislative districts. Such comments were received from both Black and American Indian leaders and the Legislature's plan for minority districts reflected the preferences of these communities with respect to the allocation of minority populations among voting districts.

On May 29, 1991, the Minnesota House and Senate enacted 1991 Minn. Laws ch. 246 ("Chapter 246"), which drew new state legislative districts. The governor attempted to veto the bill; however, the veto was later declared invalid and the bill declared law. Seventy-Seventh Minnesota State Senate v. Carlson, Court File No. C3-91-7547 (Minn. Dist. Ct., 2d Judicial Dist., August 2, 1991).

On August 9, 1991, appellees Duane Benson, et al., also filed suit in federal court, seeking a declaration that Chapter 246 violated the federal and state constitutions. The complaint did not allege that Chapter 246 violated the Voting Rights Act.

On August 21, 1992, the federal court issued a Memorandum Opinion and Order that denied motions of the Minnesota Legislature and the Secretary of State asking the federal court to abstain pending further state court action, but granted the Legislature's motion to abstain pending further legislative action. App. A-106-118.

The state court, on October 21, 1991, after an initial review of Chapter 246, stated that Chapter 246 contained "numerous infirmities, including non-contiguous districts" in contravention of the Minnesota Constitution, Article IV, §§ 2 and 3, and the Fourteenth Amendment to the United States Constitution. App. A-220. The state court ordered the parties to submit by October 7, 1991, any allegations that Chapter 246 violated the Voting Rights

Act. App. A-226. No Voting Rights Act violations were asserted in response to this order. App. A-244.

The state court completed its review of Chapter 246 on November 21, 1991, and issued an order stating:

> Most of the constitutional and statutory defects in Minnesota Law 1991, Chapter 246 can be cured by ascertaining and effectuating the legislative intent, see Minn. Stat. § 645.16 (1990); and by applying canons of statutory construction, Minn. Stat. §§ 645.16 through 645.43 (1990). App. A-244.

The state court also promulgated an order in preliminary form that established a legislative apportionment plan. The plan was based on Chapter 246 but corrected all federal and state constitutional violations. The state court expressly concluded in its order that "Chapter 246 contains no Federal Voting Rights Act violation." App. A-244. At a hearing on December 3, 1991, the state court asked the parties to identify any errors in the preliminary order and announced it intended to issue a final legislative redistricting plan shortly. Two days later, however, the federal court stayed all proceedings in the state court, including all previous orders of the state court. App. A-153-154.

On December 9, 1991, the state court issued its final redistricting plan, "subject to the stay issued by the United State District Court in Emison." App. A-259. The state court also required the parties, subject to the federal court's stay, to submit all proposed plans for congressional redistricting on or before January 17, 1992. App. A-256-260.

A Notice of Appeal of the federal court's injunction was filed on December 13, 1991. On January 10, 1992, this Court vacated

the federal court's order. App. A-166.

In the meantime, on January 9, 1992, the Minnesota House and Senate passed two bills. Senate File 1596 ("S.F. 1596") established a legislative redistricting plan based on Chapter 246 but corrected all defects in the law. Senate File 1597 ("S.F. 1597") established new congressional districts. The governor vetoed both bills on January 10, 1992.

On January 17, 1992, the intervening plaintiffs Cotlow, et al., moved the federal court to reconsider its August 21, 1991, order denying the motions of the Secretary of State and the Minnesota Legislature for the federal court to abstain pending completion of the state court action. This motion was denied without hearing or opinion on February 11, 1992. App. A-172.

On January 30, 1992, the state court entered judgment, thus finalizing the court's legislative redistricting plan. App. A-355. On January 31, 1992, the Secretary of State and the Hennepin County Attorney by letter instructed local units of government that the state court's legislative redistricting plan became final on January 30, 1992, and that the statutory requirements for local redistricting had begun to run. App. A-371-372. The letter states "city wards and precinct boundaries must be redrawn by March 30, 1992; all other election districts by April 20, 1992." Id. In accordance with these instructions, many local units of government went forward with redistricting.

On February 19, 1992, the federal court issued its final redistricting Memorandum Opinion and Order ("Order"). App. A-11. Judgment was entered on the same day. App. A-71. The federal court found that the Voting Rights Act, 42 U.S.C. § 1973, requires the creation of a majority minority senate district in Minnesota and that Chapter 246 failed to create such a district. App. A-38-39. The federal court then issued its own legislative

redistricting plan, one that was not based on Chapter 246. App. A-55. As shown by the maps in the Appendix at A-1-6, the 201 districts created by the federal court's plan are completely different from the districts created by the state court's plan.

The federal court also issued its own congressional redistricting plan based on its belief that S.F. 1597, as passed by both houses of the Minnesota Legislature, was entitled to no weight because the governor had vetoed it. App. A-53.

The federal court ordered the Secretary of State to accept filings and conduct elections only in conformance with its redistricting plans, and enjoined the Secretary from accepting filings and conducting elections inconsistent with the federal court's plans. App. A-57-58.

Appellants filed their Notice of Appeal to this Court on February 25, 1992. App. A-362. This Court has jurisdiction pursuant to 28 U.S.C. § 1253 to review a decision of a statutory three-judge district court on appeal by any party from an order granting an injunction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION

For the second time in less than three months the court below has effectively thwarted the valid exercise of jurisdiction by a state court having concurrent jurisdiction of the subject matter. On the first occasion, when the federal district court issued an order staying the state court proceeding, this Court summarily vacated the federal court's order.

Now the federal court seeks to do indirectly what this Court forbade it to do directly, namely, to defeat the implementation of the state court's redistricting plan, not by enjoining the court, but

by enjoining all Minnesota election officials from conducting elections pursuant to the state court's order. As Judge MacLaughlin stated in dissent: "Having failed to successfully enjoin the state court's reapportionment plan, the majority, instead of staying its hand and allowing the state plan to proceed, reaches out in an invalid and transparent second attempt to accomplish the same purpose." App. A-69-70.

For the reasons set forth below, this Court should again summarily vacate the federal court's order and remand with instructions to take no further action unless and until the state court fails to complete the Minnesota redistricting process.

II. THE FEDERAL COURT'S ORDER VIOLATES THE SCOTT V. GERMANO DOCTRINE

The federal court's redistricting order, although purporting to heed this Court's pronouncements in Scott v. Germano, 381 U.S. 407 (1965) (per curiam), violates both the letter and the spirit of that decision. In Germano, this Court unequivocally stated its support for the role of state courts in the redistricting process: "The power of the judiciary of a State . . . to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States has been specifically encouraged." Id. at 409.

The Court in Germano did more than emphasize the importance of the state courts in the redistricting process. It states a broad rule of deference to states and state courts in redistricting matters which extends to the circumstances of this case. See id. (vacating order of District Court and remanding with directions that District Court enter order fixing "reasonable time" within which "appropriate agencies of the state . . ., including its Supreme Court may validly redistrict the [State Legislature] . . . "); see also

Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.").[1]

The federal court's refusal in this action to follow Germano and abstain from redistricting Minnesota's legislative and congressional districts while the state court action was proceeding has now resulted in two appeals. The first appeal resulted in this Court's January 10, 1992, summary vacation of the federal court's stay of the state court. The primary ground for reversal raised by appellants was the federal court's violation of Germano. It is obvious, however, that the federal court misunderstood the nature of this Court's summary vacation of the stay:

> When the Supreme Court dissolved the injunction, the purpose of the injunction had been fulfilled. An appellate court does not work in a vacuum without a record or briefs from both sides. To urge that the Supreme Court intended to decide the complex federalism issues we now address without a plenary record and hearing demeans the appellate process. App. A-24-25, n.26.[2]

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[1] Federal courts have repeatedly recognized the clear abstention doctrine established in Germano and have deferred to parallel state court redistricting proceedings. E.g., Bianchi v. Griffing, 393 F.2d 457, 461 (2d Cir. 1968); Badham v. March Fong Eu, 568 F. Supp. 156, 158 (N.D. Cal.), aff'd sub nom. Badham v. United States Dist. Court, 721 F.2d 1170 (9th Cir. 1983); Avens v. Wright, 320 F. Supp. 677, 686 (W.D. Va. 1970); Mahoney v. Burkhardt, 299 F. Supp. 787, 789 (D.N.J. 1969).

[2] Despite the federal court's observation, it is clear that a summary reversal order is appropriate for "situations in which the law is well-settled and stable, the facts are not in dispute, and the decision below is clearly in error." Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). See generally R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice ¶ 5.12 (6th ed. 1986).

Appellants are now before this Court again, and they again seek relief from a federal court order that ignores the plain language of Germano. In its order, the federal court offers two grounds for preempting the state court's redistricting responsibilities: the existence of unspecified independent federal issues and the court's belief that the state judicial process will cause undue delay. App. A-25. Neither reason supports the court's action.

The federal court's order refers to only one federal issue allegedly not present in the state court proceedings: the alleged Voting Rights Act violations. The federal court ignores, however, the fact that the state court itself initiated consideration of alleged Voting Rights Act violations by its order directing the parties to submit to it by October 7, 1991, any allegations that Chapter 246 violated the Voting Rights Act. No violations were asserted. App. A-241. On November 21, 1991, after reviewing Chapter 246, the state court expressly determined that the statute did not violate the Voting Rights Act. App. A-244.[3]

The federal court's presumption that the state court would not be able to redistrict in a timely fashion is also simply wrong. The state court legislative redistricting plan was published on December 9, 1991, and judgment was entered on January 30, 1992. Moreover, the judgment would have been entered much sooner but for the federal court's December 5, 1991, imposition of the stay. Having itself caused the delay, the federal court cannot now rely

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[3] To the extent the federal court believed that it had exclusive jurisdiction over the Voting Rights Act, the court was wrong. See Hathorn v. Lovorn, 457 U.S. 255, 269 (1982); see also Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (concurrent state court jurisdiction presumed absent congressional provision to the contrary or disabling incompatibility).

on that delay to preempt the primary and rightful role of the state court.[4]

If a federal district court can adopt its own congressional redistricting plan while a state court is proceeding diligently to resolve a dispute between the Legislature and the Governor and adopt a plan of its own, there is no reason for the state court ever to begin. Affirmation of the district court's judgment would invite continued litigation of redistricting issues that have already been settled in the state courts and would discourage state courts from attempting to shoulder their share of the redistricting load.

Because Germano clearly dictates state court primacy in this action, and the federal court continues to misread Germano, this Court needs now to state unequivocally to the court below, and to other federal courts faced with parallel state court redistricting proceedings,[5] that states must be allowed to proceed with their own redistricting efforts. Only when it is clear that the state courts are unable to redistrict in time for an upcoming election should the federal courts attempt to assume redistricting responsibilities. This is not such a situation.

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[4] In its Procedural Order No. 7 issued March 3, 1992, the state court indicated its readiness to release a congressional redistricting plan subject only to the barrier posed by the federal court injunction which is the subject of this appeal. See App. A-440.

[5] Parallel state and federal actions are also pending in California, Illinois, Ohio, Pennsylvania, and Texas. See Table 5, App. A-391-392.

III. THE JUDGMENT OF THE MINNESOTA STATE SPECIAL REDISTRICTING PANEL IS ENTITLED TO FULL FAITH AND CREDIT

A. Final Judgment Has Been Entered In The State Court Action

On January 30, 1992, the state court judgment in Cotlow v. Growe became final. By virtue of the entry of the state court judgment the parties to the instant case are entitled to the benefits of the Full Faith and Credit Act, 28 U.S.C. § 1738.[6] The federal court was obligated to give the state court judgment the same full faith and credit that the judgment would have received in the Minnesota courts. Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525 (1986).

The state court's final judgment unanimously found that no violations of the Voting Rights Act were asserted. App. A-256. It also concluded that no such violations existed. App. A-259. That finding and that conclusion are final, subject only to review by the Minnesota appellate courts, and, ultimately, by this Court. Under Minnesota law, they are final unless appealed. State ex rel. Spratt v. Spratt, 150 Minn. 5, 7, 184 N.W. 31, 32 (1921); Simonds v. Norwich Union Indemnity Co., 73 F.2d 412, 416 (8th Cir. 1934), cert. denied, 294 U.S. 711 (1935). Thus, the federal court was precluded from reviewing the Voting Rights Act issue.

B. Appellees Are Collaterally Estopped From Challenging the State Court Judgment

In addition to the application of 28 U.S.C. § 1738, the parties to the federal court case are collaterally estopped from continuing

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[6] See App. A-374.

to raise the same issues that have necessarily been decided in Cotlow v. Growe, including Voting Rights Act issues. In Allen v. McCurry, 449 U.S. 90, 94 (1980), this Court stated: "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."

Under Minnesota law, the December 9, 1991 order is fully preclusive. In Minnesota, collateral estoppel precludes the relitigation of all issues already litigated in a prior action. Gollner v. Cram, 258 Minn. 8, 102 N.W.2d 521 (1960). The Minnesota Supreme Court has articulated four factors necessary to invoke this doctrine: 1) identical issue in prior suit; 2) final judgment on the merits; 3) estopped party was a party or in privity with party in prior suit; and 4) estopped party was given a full and fair opportunity to be heard on the adjudicated issue. Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702 (Minn. 1982). All four factors support the application of collateral estoppel in this action. The issue raised is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973b, as it applies to the state court legislative redistricting plan. The state court's judgment, entered January 30, 1992, including its conclusion that Chapter 246 contained no Voting Rights Act violations, is final until reversed. State ex rel. Spratt v. Spratt, 150 Minn. 5, 184 N.W. 31 (1921). Though the plaintiffs in Emison v. Growe were different persons than the plaintiff-intervenors in Cotlow v. Growe, privity exists because they represented the same issues, had the same attorney and both sought to advance the interests of the Independent Republican Party. See Montana v. United States, 440 U.S. 147, 154-55 (1979). All parties were given a full and fair opportunity to be heard in state

court on the Voting Rights Act issue.[7]

Therefore, based on the doctrines of Full Faith and Credit and collateral estoppel, the federal court erred in finding Voting Rights Act violations and issuing its own independent redistricting plans.

IV. THE CASE BEGUN BY APPELLEES IN THE FEDERAL COURT IS NOW MOOT

The Emison v. Growe federal court action was begun in March, 1991, approximately two months after the state court action had been commenced. By August 21, 1991, when the federal court issued its initial Order, the parties in the state court action had already stipulated that the legislative and congressional districts established in 1982 were unconstitutional and could not be used in the 1992 elections. App. A-192-195. Also, by August 21, 1991, the Minnesota state courts had ruled that Governor Carlson's attempted veto of Chapter 246 was invalid under the Minnesota Constitution and that Chapter 246 had been validly adopted. There was thus no reasonable expectation that the legislation complained of in Emison v. Growe (i.e., the old 1982 districts) would ever again be applicable to anyone. Sosna v. Iowa, 419 U.S. 393 (1975); Weinstein v. Bradford, 423 U.S. 147 (1975). Because the Emison case challenged only the old districts and did not challenge the districts created by Chapter 246, that case became moot. Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) and cases cited therein.

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[7] The state court's Pre-Trial Order No. 3 asked the parties to address at a September 24, 1991, hearing the issue of whether Chapter 246 violated the Voting Rights Act. See App. A-216. At the hearing the parties all addressed that issue. App. A-219. The intervenors submitted a memorandum challenging the state court's jurisdiction to hear any Voting Rights Act issues. The state court ruled against them.

Thereafter, the Benson v. Growe case was commenced in federal court challenging the constitutional validity of newly enacted Chapter 246. On October 1, 1991, however, the state court found Chapter 246 to be unconstitutional, as adopted, under both the Minnesota and United States Constitutions. Pre-Trial Order No. 4. App. A-138, 139. At that point Benson v. Growe was rendered moot since Chapter 246, the only law that it had challenged, was declared invalid as adopted.

On January 10, 1992, this Court vacated the federal court's stay of the state court's proceedings. When the stay was lifted, the state court entered judgment on the legislative redistricting plan it had promulgated. Since the old districts had been declared invalid and new districts had been promulgated, subject only to Minnesota appellate review, both the Emison v. Growe and Benson v. Growe actions should have been dismissed as moot.

V. THE FEDERAL COURT'S FINDING THAT THE REDISTRICTING PLAN ADOPTED BY THE STATE COURT VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT IS CLEARLY ERRONEOUS

The pretext for the federal court's preemption of the state's primacy in redistricting is the federal court's conclusion that a single senate district in Chapter 246 violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The federal court's finding in this regard is devoid of support either in law or fact. Indeed, no party ever alleged that Chapter 246 violated the Voting Rights Act.

A. The Federal Court's Finding is Contrary to Both the Language of Section 2 and This Court's Interpretation of the Statute

On its face, the complaint from which the federal court's

voting rights findings emanate fails to state a claim. The Emison complaint, the only one to have invoked the Voting Rights Act, alleges that because of shifts in population, the 1982 redistricting plan now dilutes minority voting rights in violation of Section 2. When Chapter 246, as modified by the state court, became law, however, it superseded the 1982 redistricting plan and any alleged voting rights violations under the prior plan became irrelevant. As Judge MacLaughlin points out in dissent:

> [N]o party to this suit has alleged, much less proved, that Chapter 246 violates section 2 of the Voting Rights Act; rather, plaintiffs have asserted only that their proposed plan "better" preserves the political power of minorities. There is no requirement, however, that a lawfully enacted reapportionment plan that complies with the Voting Rights Act be set aside in favor of an allegedly "better" plan. App. A-63.

Section 2 prohibits the legislature from adopting a redistricting plan which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,..." The Voting Rights Act does not, however, require that districts be drawn to maximize the opportunity of minority voters to elect representatives of their choice. See Thornburg v. Gingles, 478 U.S. 30, 94 (1986) (O'Connor, J., concurring) (in enacting Section 2, Congress did not intend to provide minority voters with "maximum feasible minority voting strength").

In addition to the deficiencies in the Emison complaint, the federal court's findings are also deficient in that they fail to identify facts sufficient to satisfy the threshold requirement for a Voting Rights Act violation as articulated by this Court in Gingles. See id. at 48. This Court identified three circumstances as

necessary preconditions to a conclusion that a districting structure violated the Act: 1) the minority group has to be shown to be sufficiently large and geographically compact as to be able to constitute a majority in a single-member district; 2) the minority group has to be shown to be politically cohesive; and 3) the party challenging the plan or structure has to demonstrate that, absent special circumstances, bloc voting by the white majority in the challenged district usually defeats the minority's preferred candidate.[8] Id. at 50-51.

With respect to the first Gingles precondition, it is not possible to draw a geographically compact House or Senate district in Minnesota in which members of a single minority group would constitute a majority of the voting age population of the district. In drafting Chapter 246, both the House and Senate authors started by looking for areas in which members of a racial or language minority group were "sufficiently large and geographically compact to constitute a majority in a single member district." Gingles, 478 U.S. at 50. They found none. Even by lumping minority groups together within a district, the authors of the redistricting plan were able to create only three House districts in which combined groups of minority members constituted a majority of the total population.

[8] Although Gingles involved a challenge to a redistricting plan which created multimember districts in which two or more officials were elected at large, the same considerations that led this Court to articulate the Gingles threshold test apply as well in the context of redistricting plans involving single-member districts. As Judge MacLaughlin notes in his dissent, in the absence of any principled basis for distinguishing between challenges to multimember districting schemes and challenges to single-member districting schemes, numerous courts have concluded that the Gingles test applies to both types of voting rights challenges. See App. A-63-64.

See Table 1, App. A-380.[9]

Nor has the second precondition of Gingles been shown to exist in Minnesota. As other courts have recognized, it is difficult to demonstrate political cohesiveness within a single minority group, much less among members of different minority groups. See, e.g., Romero v. City of Pomona, 883 F.2d 1418, 1426 (9th Cir. 1989) (Blacks and Hispanics in Pomona found not to be politically cohesive). The record in this action is devoid of any evidence that the members of a single minority group are politically cohesive. More importantly, there are no facts to support a finding that different minority groups found within Minnesota are politically cohesive.

The third Gingles precondition also has not been shown to exist in Minnesota. There is no allegation, much less evidence, that non-minority voters vote as a bloc against candidates supported by minority voters.[10] Appellants submit that no such showing could be made.

The burden is on parties challenging a redistricting plan to show that all three of the Gingles requirements exist. No party to this action has alleged a Voting Rights Act violation with regard to Chapter 246 and so no party has attempted to show that the Gingles preconditions can be met. Accordingly, the Voting Rights

[9] The federal plan differs little in its provision for districts with significant minority populations. See Table 3, App. A-383-384. Indeed, the federal plan fails to create the super-majority minority district the federal court set out to achieve if one considers the voting age minority population.

[10] To the contrary, a comparison of the Official Directory of the Minnesota Legislature from 1969 to 1991 with the census counts of 1980 and 1990 shows that several "people of color" have been elected to the Minnesota legislature from districts having a white majority voting population in every election from 1968 through 1990.

Act issue must be resolved in favor of appellants. See McNeil v. Springfield Park Dist., 851 F.2d 937, 942 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989).

B. The Federal Court's Finding Is Unsupported by Evidence in the Record

Even were the Gingles test not applicable here, the federal court's finding of a voting rights violation is without any factual support.[11]

In Gingles, before articulating the precise standard to be applied to Section 2 challenges to multimember districting plans, the Court identified certain overriding basic principles which it deemed generally applicable in considering voting rights cases.

> First, electoral devices . . . may not be considered per se violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. . . . Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. . . . Third, the results test [set forth in § 2 and its legislative history] does not assume the existence of racial bloc voting; plaintiffs must prove it. . . .

Gingles, 478 U.S. at 46. As Judge MacLaughlin concludes, the federal court majority disregards each of these three basic principles of voting rights jurisprudence.

The central focus of the federal court's voting rights finding is the failure by the legislature to create a super-majority minority senate district in Minneapolis. Indeed, as noted by Judge MacLaughlin, "The majority's holding is, in effect, a conclusion that a redistricting plan that does not contain a super-majority minority senate district in Minneapolis is an electoral device that is per se violative of Section 2." App. A-65. But see Table 3-2, App. A-383-384. Whatever the merits of creating a super-majority minority district may be, the absence of such districts may not be considered per se violative of Section 2 under the general principles articulated by this Court in Gingles.[12]

Nor has the federal court demonstrated that "under the totality of the circumstances," the absence of a super-majority minority district has resulted in unequal access to the electoral process for minorities. It is incredible that any conclusion about minority access to the electoral process could reasonably be drawn today from a provision of the Minnesota Constitution restricting voting rights to white people which was repealed more than a century ago. Similarly, judicial findings in two school desegregation cases from the 1970s cannot be presumed to reflect accurately the educational status of a minority population nearly 20 years after the implementation of court-ordered desegregation, let alone be deemed authoritative in predicting how the educational status of minorities in Minnesota has influenced their access to the electoral process. The federal court's reliance on a newspaper article reflecting performance gaps between minority and majority

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[11] As Judge MacLaughlin notes in his dissent, the majority reached its conclusions on the voting rights issues without having had the benefit of briefing or oral argument on the voting rights violations it purports to find. App. A-62, n.3. No evidentiary hearings were held on the voting rights issue and appellants were afforded no opportunity to address the "evidence" on which the federal court's finding of a voting rights violation turns.

[12] Leaders of the Black community in Minneapolis opposed the creation of a senate district of the type mandated by the federal court. See App. A-368.

students in Minneapolis is equally inappropriate. See also App. A-65.

That the state redistricting plan fails to pit incumbent Minneapolis state senators against each other also does not show that minority voters have been denied an equal opportunity to elect representatives of their choice absent evidence that the incumbent representatives have failed to represent minority interests.

Similarly, that the number of minority legislators from Minneapolis is not proportional to the percentage of minorities living in Minneapolis does not establish a violation of Section 2. As Judge MacLaughlin states, "Section 2 . . . specifically cautions against resting findings of voting rights violations on the lack of proportional representation. See 42 U.S.C. § 1973(b)." App. A-66. The federal court's inference that because the number of minority legislators from the City of Minneapolis is not proportional to the City's minority population, minority voters must necessarily have been denied an equal opportunity to elect the "representatives of their choice," 42 U.S.C. § 1973(b), is unwarranted. A piece of evidence essential to that conclusion, namely that minority voters, if given the opportunity to do so, would always choose a minority candidate over a non-minority candidate, is completely lacking in this case. As Judge MacLaughlin recognizes, in addition to being logically faulty, the federal court's conclusion violates the second principle of voting rights jurisprudence set forth in Gingles. App. A-66.

Finally, the federal court violates the third principle of voting rights jurisprudence by assuming, rather than requiring the plaintiffs to prove the existence of, racial bloc voting. The existence of racial bloc voting is, as Gingles recognizes, "a key element of a vote dilution claim." Gingles, 478 U.S. at 55. The federal court admits that the record contains no statistical data

attempting to correlate voting patterns with the race of voters and candidates. In lieu of specific statistical data, the federal court accepts as probative of the existence of racial bloc voting a sweeping generalization contained in a law review article that "racial bloc voting [is] all but inevitable in the vast majority of cases." App. A-67. Again, as Judge MacLaughlin notes, "The majority's assumption that racial bloc voting is 'all but inevitable' in this case . . . is precisely the assumption that the Supreme Court and the legislative history accompanying Section 2 forbid. The broad, generalized statements of commentators cannot substitute for evidence of racially polarized voting." App. A-67.

In short, the record contains no evidence to support a conclusion that the lack of super-majority concentrations of minorities in the past has deprived minorities of equal access to the political process or, more importantly, that the state's redistricting plan will lessen the opportunity of minorities to participate in the political process and to elect representatives of their choice in the future.

VI. THE FEDERAL COURT'S REMEDY VIOLATES ESTABLISHED PRECEDENT

As Judge MacLaughlin emphasizes in his dissent, even if the federal court correctly determined that a portion of the state court redistricting plan violates the Voting Rights Act, the federal court erred in redistricting the entire state along lines it finds preferable instead of following state policy as mandated by White v. Weiser, 412 U.S. 783 (1973) and Upham v. Seamon, 456 U.S. 37 (1982) (per curiam). See App. A-68. In Weiser, a federal court, faced with choosing between two redistricting plans, one of which was based on a defective state statute while the other was totally independent of the state law, chose the redistricting plan not based

on state law. 412 U.S. at 793-94. On appeal, the Court opined: "[A] federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions." Id. at 795. Because the federal court had rejected the plan that was based on state law, the Court concluded it had erred. Id.

In this case, the Court is presented with almost the identical situation. The Minnesota Legislature has enacted Chapter 246, the state's redistricting law. Chapter 246 is the type of expression of state policy this Court contemplated in Weiser.[13] Just as in Weiser, the federal court in this case determined that Chapter 246 was flawed. However, just as in Weiser, the federal court chose to ignore Chapter 246 and the redistricting plan that tracked Chapter 246, and instead created a plan that is entirely independent of and inconsistent with Chapter 246.

Not only has the federal court ignored state policy as reflected in Chapter 246, it has also ignored state policy as reflected in the state court redistricting plan, which tracked Chapter 246 except where necessary to correct its technical deficiencies. Given this Court's express encouragement of such state court actions, see supra Part II, the federal court was not free to ignore the clear expression of state policy found in the state court redistricting plan. But that is exactly what it did.

The federal court's remedy is also flawed because it is far more drastic than is required. As the Court stated in Weiser, the remedial powers of an equity court are limited to the task at hand. 412 U.S. at 796. Upham v. Seamon, 456 U.S. 37 (1982) (per

[13] The federal court concluded that state policy was only found in the state constitution and a concurrent resolution of the Minnesota Legislature. App. A-43-44, 52. Chapter 246 is consistent with both of these. App. A-68.

curiam), specifically limits federal courts to redistricting only invalid districts. In Upham, this Court summarily reversed a federal district court order that had reapportioned both valid and invalid districts. In reversing, the Court relied heavily on Weiser and also stated that in the absence of a constitutional or Voting Rights Act violation a "district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." Id. at 43 (emphasis added). See also Whitcomb v. Chavis, 403 U.S. 124, 160-61 (1971).

Here, the federal court was limited by Weiser and Upham to redistricting only those districts that purportedly are invalid. That easily could have been accomplished by adjusting some, and certainly less than all, of the eighteen Minneapolis legislative districts. Instead, the federal court chose to redistrict the entire state of Minnesota.

With respect to congressional redistricting, the plain language of Weiser directs federal courts to follow state policy in drawing congressional districts. See Weiser, 412 U.S. at 795. In this case, state congressional redistricting policy is reflected in S.F. 1597, which passed both houses of the state legislature.[14] The federal court once again, however, ignored state policy to create its own policy, one that it asserts achieves the lowest population deviations and is more compact. App. A-55. But under Weiser, consider-

[14] The federal court concluded that S.F. 1597 was not state policy because Governor Carlson vetoed it. Order at 48-49. The federal court relied on Duxbury v. Donovan, 272 Minn. 424, 432-33, 138 N.W.2d 692, 698 (1965), for this conclusion, but that case only addresses whether the governor has the power to veto a redistricting bill. Id. ("Our only duty in this situation is to decide whether the power to veto exists with respect to apportionment legislation."). Weiser, on the other hand, expressly addresses what constitutes state policy, namely, "statutory and constitutional provisions or . . . the reapportionment plans proposed by the state legislature." 412 U.S. at 795 (emphasis added).

ations of population equality and compactness alone "do not override whatever state goals were embodied in [the legislative enactment and a redistricting plan based on that enactment]." Id. at 796. Therefore, the federal court also violated White v. Weiser in congressional redistricting by ignoring clear state policy.

CONCLUSION

Appellants respectfully request this Court to note probable jurisdiction, summarily reverse the February 19, 1992, order and instruct the federal district court to refrain from acting unless and until it becomes clear that the state agencies will be unable to have redistricting plans in place in time for the upcoming elections. In the alternative, appellants respectfully request the Court to note probable jurisdiction and to hear this appeal on an expedited basis.

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Respectfully submitted,

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